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Tan Chow Cheang v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-05(LB)–54–01 OF 2016
AHMADI ASNAWI, ZALEHA YUSOF AND KAMARDIN HASHIM JJCA
3 NOVEMBER 2017

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Criminal Procedure — Trial — Discharge — Order of discharge not amounting to acquittal — Whether justified — Whether warranted by facts and circumstances — Whether prosecution's case collapsed prematurely — Whether proper to discharge accused amounting to acquittal — Criminal Procedure Code s 254

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The appellant was charged in the High Court for trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952. On 17 September 2015, the defence suddenly produced a CCTV recording and applied for it to be viewed by the court as it was their case that the drug was planted. The prosecution was caught by surprise and the case was therefore adjourned. After several adjournments, the case was then fixed for hearing on 12 January 2016. On 12 January 2016, the CCTV recording was viewed through a pendrive and the pendrive was marked as IDD27 despite the prosecution's objection. Two certificates under s 90A of the Evidence Act 1950 were produced and marked as IDD26A and IDD26B. The prosecution then made an application under s 254(3) of the Criminal Procedure Code ('the CPC') to discharge the appellant not amounting to an acquittal ('the DNAA') pending the forensic report of the CCTV recording. The defence strongly objected to the DNAA and submitted that the appellant was entitled to be acquitted and discharged as upon the production of the CCTV recording, the sole or main prop in the prosecution's case collapsed prematurely. The High Court judge agreed with the prosecution's request and ordered the appellant to be DNAA. Hence, the present appeal. It was the appellant's contention that: (a) the High Court judge erred in refusing to mark IDD26A, IDD26B and IDD27 as D26A, D26B and D27 respectively; (b) the maker of IDD26A was in court during the trial and she could be called to give oral evidence on IDD27 and IDD26A; and (c) with the marking of the 'IDDs' to 'Ds', the sole or main prop in the prosecution's case would have collapsed prematurely and the appellant should be discharges amounting to an acquittal ('DAA').

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Held, dismissing the appeal, affirming the High Court order of discharge not amounting acquittal:

(1) The word used in the sub-s 90A(2) of the Evidence Act 1950 is 'may'. Hence, the production of the certificate was not the conclusive way to prove the pendrive's admissibility, especially so, when the content was being disputed. To allow it to be admitted in such circumstances would be open to abuse. It is not impossible during this era of modern technology for images to be superimposed or tempered with. Therefore, it was only safe for witnesses to be called either to confirm or to rebut it (see paras 11–12).

(2) When the application for DNAA was made, it was still at the prosecution stage. It was up to the prosecution to call whoever and whatever number of witnesses it thought material to prove its case. The appellant had insisted that the prosecution should have called the maker of IDD26A who was then in court, to give evidence so that IDD26A could be marked as D26A. This, however, was not a good proposition as it would 'be to assent that the prosecution are obliged to call a witness for no purpose other than assist the defence in its endeavour to destroy the Crown's own case' (*R v Russel–Jones* [1995] 3 All ER 239) (see paras 13–14).

(3) With the new provision of s 254A of the CPC, if an accused is DNAA, he can be recharged and the case is to continue from where it stopped. This showed that the decision to DNAA by the High Court judge was not a final decision. It was made on the application of the prosecution to continue with the investigation on the issue of CCTV. Therefore, it was premature at this stage for the order made be appealed against (see para 21).

[Bahasa Malaysia summary

Perayu dipertuduh di Mahkamah Tinggi kerana mengedar dadah berbahaya bawah s 39B(1)(a) Akta Dadah Berbahaya 1952. Pada 17 September 2015, pembelaan tiba-tiba mengemukakan rakaman CCTV dan memohon untuk ditonton oleh mahkamah kerana adalah kes pembelaan bahawa dadah tersebut sengaja diletakkan oleh orang lain. Pihak pendakwaan terkejut dan kes ditangguhkan. Setelah beberapa penangguhan, kes kemudian ditetapkan untuk pendengaran pada 12 Januari 2016. Pada 12 Januari 2016, rakaman CCTV ditonton melalui pemacu pena dan pemacu pena tersebut ditandakan sebagai IDD27 walaupun dibantah pihak pendakwaan. Dua sijil di bawah s 90A Akta Keterangan 1950 dikeluarkan dan ditanda sebagai IDD26A dan IDD26B. Pendakwaan kemudiannya membuat permohonan di bawah s 254(3) Kanun Tatacara Jenayah ('KTJ') supaya perayu dilepas tanpa dibebaskan ('DNAA') sementara menunggu laporan forensik rakaman CCTV. Pihak pembelaan membantah DNAA dan menghujahkan bahawa perayu berhak untuk dilepaskan dan dibebaskan kerana dengan mengemukakan rakaman CCTV, kes pendakwaan gagal. Hakim Mahkamah Tinggi bersetuju dengan permohonan pendakwaan dan memerintahkan perayu DNAA. Oleh itu, rayuan ini. Perayu menghujahkan bahawa: (a) hakim Mahkamah Tinggi

terkhilaf apabila tidak menandakan IDD26A, IDD26B dan IDD27 masing-masing sebagai D26A, D26B dan D27; (b) pembuat IDD26A berada di mahkamah semasa perbicaraan dan harus dipanggil untuk memberikan keterangan lisan mengenai IDD27 dan IDD26A; dan (c) dengan menandakan 'IDD' kepada 'Ds', kes pendakwaan gagal dan perayu hendaklah dilepaskan dan dibebaskan ('DAA').

Diputuskan, menolak rayuan; mengesahkan perintah pelepasan tanpa pembebasan oleh Mahkamah Tinggi:

(1) Perkataan yang digunakan dalam sub-s 90A(2) Akta Keterangan 1950 adalah 'mungkin'. Oleh itu, pengeluaran sijil bukanlah cara yang konklusif untuk membuktikan kebolehterimaan pemacu pena tersebut, terutamanya apabila kandungannya dipertikaikan. Untuk membenarkannya diterima masuk dalam keadaan sedemikian akan menjurus kepada penyalahgunaan. Tidak mustahil dalam era teknologi moden ini untuk imej-imej diubah suai. Oleh itu, adalah selamat untuk memanggil saksi sama ada untuk mengesahkan atau menafikannya (lihat perenggan 11–12).

(2) Apabila permohonan untuk DNAA dibuat, ia masih di peringkat pendakwaan. Terpulang kepada pihak pendakwaan untuk memanggil sesiapa dan berapa banyak saksi yang difikirkannya penting untuk membuktikan kesnya. Perayu telah menegaskan bahawa pihak pendakwaan sepatutnya memanggil pembuat IDD26A yang berada di mahkamah, untuk memberi keterangan supaya IDD26A boleh ditandakan sebagai D26A. Walau bagaimanapun, ini bukan merupakan proposisi yang baik kerana ia 'be to assent that the prosecution are obliged to call a witness for no purpose other than assist the defence in its endeavour to destroy the Crown's own case' (*R v Russel–Jones* [1995] 3 All ER 239) (lihat perenggan 13–14).

(3) Dengan peruntukan baru s 254A KTJ, jika tertuduh DNAA, dia boleh dipertuduh semula dan kes akan diteruskan dari mana ia tamat. Ini menunjukkan bahawa keputusan untuk DNAA oleh hakim Mahkamah Tinggi bukan keputusan muktamad. Ia dibuat atas permohonan pendakwaan untuk meneruskan penyiasatan mengenai isu CCTV. Oleh itu, adalah pramatang pada peringkat ini untuk merayu terhadap perintah yang dibuat (lihat perenggan 21).]

Notes

For cases on discharge not amounting to acquittal, see 5(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5897–5898.

Cases referred to

Chong Boon Sim v PP [2015] 3 MLJ 567, CA (refd)
Koh Teck Chai v PP [1968] 1 MLJ 166 (refd)
Kunalan a/l Kandasamy lwn Pendakwa Raya [2014] 3 MLJ 266, CA (refd)
PP v Au Seh Chun [1998] 6 MLJ 179; [1998] 3 CLJ Supp 56, HC (refd)
PP v Jufri bin Nanti [2016] MLJU 823, CA (refd)
PP v Syed Abdul Bahari Shahabuddin [1976] 1 MLJ 87 (refd)
PP v Zainuddin & Anor [1986] 2 MLJ 100, SC (refd)

Legislation referred to

Criminal Procedure Code ss 254, 254(3), 254A, 376
Dangerous Drugs Act 1952 s 39B(1)(a)
Evidence Act 1950 s 90A, 90A(2)
Federal Constitution art 145

Appeal from: Criminal Trial No 45A-05–03 of 2014 (High Court, Muar)

Lee Han Yen (Firus bt Said with him) (Lee Han Yen & Co) for the appellant.
Iswa bt Tonie (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Zaleha Yusof JCA:

[1] The appellant was charged in the High Court at Muar for drug trafficking under s 39B(1)(a) of the Dangerous Drugs Act 1952. The full trial by the High Court started on 1 September 2015. Three witnesses gave evidence on that day and the case was then adjourned to 17 September 2015 for continued hearing.

[2] On 17 September 2015, during the cross-examination of PW5, Konstabel L/K Amer bin Ilyas, one of the raiding officers involved in the raid, the defence suddenly produced a CCTV recording and applied for it to be viewed by the court as it was their case that the drug was planted. The prosecution was caught by surprise and the case was therefore adjourned to 15 November 2015.

[3] On 13 October 2015, the defence handed over the pendrive of the CCTV recording to the prosecution. As the recording was only received on 13 October 2015, the hearing on 15 November 2015 was adjourned to 6 January 2016 pending instruction from the prosecution's headquarters in Putrajaya. What transpired on 6 January 2016 was not recorded in the notes of proceeding except that it was called up at 2.30pm and fixed for continued hearing on '12 January 2016, (final)'.

[4] On 12 January 2016, PW5 completed his evidence, the CCTV recording was viewed through the pendrive and the pendrive was marked as IDD27 despite the prosecution's objection. Two certificates under s 90A of the Evidence Act 1950 were produced and marked as IDD26A and IDD26B.

[5] Upon completion of PW5's evidence, the prosecution made an application under s 254(3) of the Criminal Procedure Code ('the CPC') to discharge the appellant not amounting to an acquittal ('DNAA') pending the forensic report of the CCTV recording. The defence on the other hand strongly objected to the DNAA and submitted that the appellant was entitled to be acquitted and discharged as upon the production of the CCTV recording, the sole or main prop in the prosecution case collapsed prematurely.

[6] The learned High Court judge agreed with the prosecution's request and ordered the appellant to be DNAA. Dissatisfied, the appellant filed the present appeal.

THE APPEAL

[7] The issue was whether the learned High Court judge was correct when Her Ladyship made the order of DNAA instead of an acquittal and discharge ('DAA').

[8] The appellant relied heavily on the CCTV recording. It was submitted that there was no denial by PW5 that his image was seen on the CCTV. It was also submitted that with the production of exhibits IDD26A and IDD26B, the certificates purportedly issued under sub-s 90A(2), the pendrive containing the CCTV recording, IDD27, ought to have been admitted in evidence and consequently marked as D27. IDD26A and IDD26B also ought to have been marked as D26A and D26B respectively as they had already fulfilled the requirements of sub-s 90A(2).

[9] The learned High Court judge in rejecting the appellant's application to mark IDD27, IDD26A and IDD26B as evidence had, inter alia, stated the following as her reasons:

(a) the images shown were not clear or blurred;

(b) although SP5 admitted that he was there, but he denied the time shown on the footage;

(c) it had not been shown that it was the daily task of the individual who issued IDD26A to operate the said CCTV computer; and

(d) IDD26B was not issued by a person from the CCTV computer company.

[10] It was the appellant's contention that the learned High Court judge erred in refusing to mark IDD26A, IDD26B and IDD27 as D26A, D26B and D27 respectively. Learned counsel for the appellant submitted that the maker of IDD26A was in court during the trial and she could be called to give oral evidence on IDD27 and IDD26A. Learned counsel further submitted that with the marking of the 'IDDs' to 'Ds', the sole or main prop in the prosecution's case would have collapsed prematurely and the appellant should be DAA.

OUR DECISION

[11] With due respect to learned counsel for the appellant we could not agree with his argument even though IDD26A was certified by a director responsible for the management of the operation of the computer. The learned High Court judge had averred in her judgment that the image in the video was blurry and PW5 himself had refuted the time shown on it. Subsection 90A(2) provides as follows:

> (2) For the purposes of this section *it may be* proved that a document was produced by a computer in the course of its ordinary use by tendering to the court a certificate signed by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which the computer was used.

[12] The word used in the subsection is 'may'. Hence the production of the certificate in our view is not the conclusive way to prove the pendrive's admissibility. Especially so when the content was being disputed. To allow it to be admitted in such circumstances in, our view, would be open to abuse. It is not impossible during this era of modern technology for images to be superimposed or tempered with. Therefore it is only safe for witnesses to be called either to confirm or to rebut it.

[13] It must also be born in mind that when the application for DNAA was made it was still at the prosecution stage. The burden of proof at this stage was on the prosecution. Therefore it was our view that it was up to the prosecution to prove its case. For that matter, it was up to the prosecution to call whoever and whatever number of witnesses it thought material to prove its case. On the discretion of prosecution to call witnesses, this court in *Public Prosecutor v Jufri bin Nanti* [2016] MLJU 823 had stated the following:

> The learned trial judge was of the view that the learned deputy was correct in not calling the psychiatrist who did the psychiatric evaluation on the appellant. The learned trial judge in doing so had referred to the English case of *R v Russell–Jones* [1995] 3 All ER 239 ('*Russell–Jones* case'). In that case, learned Lord Justice Kennedy had occasion to put in perspective the proper role of the prosecutor in deciding who to call to testify in order to forward the prosecution's case against an

accused person. It is a judgement call which the prosecutor will have to decide in line with the general principle that he has the discretion in calling as a Crown witness whom he thinks is appropriate and material in advancing the prosecution's case. But one thing is clear when a prosecutor decides who to call as his witness for the Crown's case. It is this: The prosecutor is not obliged to proffer a witness whose only utility would be to enable and to arm the defence to attack and undermine the prosecution's other witnesses on whose evidence the prosecution relies on to prove its case against the accused person. To impose that duty or obligation on the prosecution would be tantamount to an affront to the essence of what criminal justice jurisprudence is all about. We reproduce that part of His Lordship's speech on behalf of the English Court of Appeal, like so:

> A prosecutor properly exercising his discretion will not therefore be obliged to proffer a witness merely in order to give the defence material with which to attack the credit of other witnesses on whom the Crown relies. To hold otherwise would in truth, be to assert that the prosecution are obliged to call a witness for no purpose other than to assist the defence in its endeavour to destroy the Crown's own case. No sensible rule of justice could require such a stance to be taken.

We can only record our agreement with the acute observation made by Kennedy LJ in the *Russel-Jones* case as really, it has aptly described the proper exercise of prosecutorial discretion in our country when it comes to deciding who to be called and also who not to call, in the overall execution of that important discretion which the law places on the office of the public prosecutor and thus its agents, such as his deputies. That discretion whom to call and whom not to call by the prosecution will ultimately be tested at the end of the prosecution's case in that it should not leave a material gap in its case against the accused person, for if it does, then it would mean that it has not succeeded in proving a prima facie case against him. In such an instance, then the accused person must be acquitted and discharged from the charge proffered against him, at the end of the prosecution's case.

[14] Learned counsel for the appellant had insisted that the prosecution should have called the maker of IDD26A who was then in court, to give evidence so that IDD26A could be marked as D26A. This in our view was not a good proposition. To requote Lord Justice Kennedy in *Russell-Jones* case, as quoted by this court in *Jufri*'s case, 'to hold otherwise would in truth, be to assent that the prosecution are obliged to call a witness for no purpose other than to assist the defence in its endeavour to destroy the Crown's own case'. See also Court of Appeal decision in *Kunalan a/l Kandasamy lwn Pendakwa Raya* [2014] 3 MLJ 266 and *Chong Boon Sim v Public Prosecutor* [2015] 3 MLJ 567.

[15] The discretionary powers of the public prosecutor to institute, conduct or discontinue any criminal proceedings is based on art 145 of the Federal Constitution as well as s 376 of the CPC. Further, s 254 of the CPC provides as follows:

(1) At any stage of any trial, before the delivery of judgment, the public prosecutor may, if he thinks fit, inform the court that he will not further prosecute the accused upon the charge and thereupon all proceedings on the charge against the accused shall be stayed and the accused shall be discharged of and from the same.

(2) At any stage of any trial before a sessions court or a magistrate's court before the delivery of judgment, the officer conducting the prosecution may, if he thinks fit, inform the court that he does not propose further to prosecute the accused upon the charge, and thereupon all proceedings on the charge against the accused may be stayed by leave of the court and, if so stayed, the accused shall be discharged of and from the same.

(3) Such discharge shall not amount to an acquittal unless the court so directs.

[16] The provision above allows the court to stay the proceeding on the charge and to discharge the accused if the public prosecutor declines to prosecute further at any stage. The issue here is whether the discharge should be DNAA or DAA because of the words 'unless the court so directs'.

[17] It was the appellant's argument that the order in this instant appeal should be DAA as the prosecution had failed to obtain forensic report even after a few postponements. Learned counsel for the appellant relied on two High Court decisions in *Koh Teck Chai v Public Prosecutor* [1968] 1 MLJ 166 and *Public Prosecutor v Syed Abdul Bahari Shahabuddin* [1976] 1 MLJ 87. In *Koh Teck Chai* case, it was held:

> Held: the power enabling the discharge of the accused person without acquitting him is a power which should be exercised sparingly and grudgingly and only where the court is satisfied for good cause shown that the public interest insistently demands that it be used. Our courts have consistently adopted the line that unless some very good ground is shown it would not be right to leave an individual for an indefinite period with a charge hanging over him. In the circumstances of this case the order of the learned magistrate should be varied so that the discharge should amount to an acquittal.

[18] Learned counsel for the appellant also quoted *Syed Abdul Bahari*, wherein it was, inter alia, held:

> Held: (1) unless there are good grounds to the contrary a discharge under s 254 of the Criminal Procedure Code should amount to an acquittal. Good grounds would arise where the prosecution is unable to proceed for the time being but can satisfy the court that the temporary impediment is not insurmountable and that it will proceed within a reasonable time.

[19] Learned DPP however quoted another High Court decision in *Public Prosecutor v Au Seh Chun* [1998] 6 MLJ 179; [1998] 3 CLJ Supp 56 wherein Suriyadi J (as His Lordship then was) in deciding on s 254 of the CPC

concluded as follows:

> To conclude on the matter at hand, there was no justification for the learned magistrate to issue the order of discharge not amounting to an acquittal, in the circumstances of the case when:
>
> (1) there was nothing to show that the charge was groundless (s 173(g));
>
> (2) it is absurd to think that he could nonchalantly brush aside the constitutional powers of the Attorney General conferred under art 145(3) of the Federal Constitution;
>
> (3) no inherent powers similar to that of subordinate courts in England;
>
> (4) the basis of the non-adherence of the orders for the prosecution to supply the documents were never complied with in accordance with s 51 of the Criminal Procedure Code. Even if the provision of s 51 of the Code had been complied with by the learned magistrate that non-cooperation by the prosecution did not empower or entitle him to pronounce that relevant order;
>
> (5) there was no indication that the public prosecutor agreed to his act; and
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> (6) there was absolutely no valid reason recorded in the notes of proceeding as to the basis of his order.
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> In the circumstances of the case, the learned magistrate should have postponed the case as he was rich in the grounds towards that direction and short in valid grounds for the discharge order. By virtue of the above reasons I had no hesitation in setting aside the court's order below and reinstate the case before him.

[20] We noted that all the cases quoted were pre 2010 cases. In 2010 the CPC was amended to include the following provision:

> Section 254A Reinstatement of trial after discharge.
>
> (1) Subject to subsection (2), where an accused has been given a discharge by the court and he is recharged for the same offence, his trial shall be reinstated and be continued as if there had been no such order given.
>
> (2) Subsection (1) shall only apply where witnesses have been called to give evidence at the trial before the order for a discharge has been given by the court.

[21] With the new provision of s 254A, if an accused is DNAA, he can be recharged and the case is to continue from where it stopped. This in our opinion only shows that the decision to DNAA by the learned High Court judge as in this instant is not a final decision. It was made on the application of the DPP to continue with the investigation on the issue of CCTV. Even the investigation officer has yet to be called. Therefore we opined, it was premature at this stage for the order made be appealed against.

[22] Let us reiterate here that the power to prosecute a case is upon the public prosecutor. Salleh Abas LP in *Public Prosecutor v Zainuddin & Anor* [1986] 2 MLJ 100 at p 102 had stated as follows:

> Section 376 empowers the attorney general who is also the public prosecutor to control and give direction over and in respect of all criminal prosecutions and proceedings, whilst art 145(3) declares that 'the attorney general shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence ...'
>
> Since the attorney general has this power exercisable at his discretion, it is not for the court to say when the prosecution has to close its case or has to come to an end merely because it is unable to obtain a postponement in order to produce evidence which will prove the offence against the accused, and thus acquit him on the basis of no evidence or on the basis of the evidence thus far produced without waiting for the evidence for which postponement is sought, citing as an authority a burden of proof principle that it is for the prosecution to prove the guilt of the accused. Of course, the prosecution has the duty to do so, but the court has no power to stop the prosecution from performing its duty by acquitting without hearing evidence. Moreover this burden of proof principle will be applicable only when the prosecution has called all the evidence which it wishes to produce in support of its case, including the evidence which is not capable of being produced at the trial without the necessity of a postponement.

[23] In conclusion, we found no merit in this appeal. We affirmed the decision of the learned High Court judge to DNAA the appellant and this appeal was therefore dismissed.

Appeal dismissed, High Court order of discharge not amounting to acquittal affirmed.

Reported by Afiq Mohammad Noor